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JUN 23 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 23, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: WT Docket 97-82
Comments of Creative Airtime Services, LLC

Dear Mr. Caton:

Transmitted herewith, on behalf of Creative Airtime Services, LLC, are an original and four copies of its Comments in response to the Commission's Public Notice No. DA 97-679, released June 2, 1997. Creative requests that the Commission include MTA-based 900 MHz SMR licensees in its proceeding to review the installment payment policies for certain "small business" auction winners.

Please date-stamp the enclosed "S&R" version of this pleading and return it to the courier delivering this package. If you have any questions concerning this filing, please call me.

Sincerely,


Russ Taylor

Enclosures

cc: Sande Taxali, *Auctions and Industry Analysis Division*

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 23 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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In the Matter of Amendment) WT Docket No. 97-82
of Part 1 of the Commission's Rules --)
Competitive Bidding Proceeding)

To: Wireless Telecommunications Bureau

Comments of Creative Airtime Services, LLC

Creative Airtime Services, LLC ("Creative") hereby files its comments in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice DA No. 97-679, released June 2, 1997. As set forth in greater detail below, Creative believes that, to the extent that the Commission relaxes the payment obligations imposed on PCS C & F block licensees, similar measures must also be taken with respect to licensees of other commercial mobile radio services ("CMRS") who are paying winning auction bids by installment.

I. Background

Creative is a 900 MHz Specialized Mobile Radio ("SMR") licensee. Creative participated in the Commission's 900 MHz SMR auction in 1996 and was awarded three MTA-based licensees. See Public Notice No. DA 96-1322, released August 16, 1996. Since the conclusion of the auction, Creative has timely performed on every Commission obligation imposed by the rules. In particular, Creative is currently timely paying for almost 1.5 million dollars in net bids by quarterly installments. Unlike many of the successful bidders in the

PCS auction, Creative was not a start-up venture formed for the purposes of seeking opportunities in a spectrum auction. Additionally, because of its size, Creative cannot secure financing from the public markets. Creative has financed its successful 900 MHz SMR buildout using the personal funds of its owner and credit from local lending institutions. Thus, Creative, and other similarly-situated 900 MHz SMR licensees, are the true entrepreneurs that the Commission should also consider if it revises its installment payment scheme.

Creative, like many other FCC wireless licensees, has watched the Commission auction and license its future PCS competitors. Like many other observers, Creative noted the high prices commanded in the PCS auctions, especially some of the bids that were purportedly placed by entrepreneurs or "small businesses." Creative also recently witnessed the Commission, in a stunning reversal¹ of its highly-touted free market auction policy, abruptly suspend the installment payment program for PCS licensees. Creative submits these comments to ensure that the Commission, if it decides to take action that alters the installment payment policies for these broadband PCS licensees, does not create inequities among similar wireless services.

II. The Commission Must Apply Its Auction Rules In A Consistent Manner

The Commission is required by the 1993 Omnibus Budget Reconciliation Act of 1993 to establish regulatory symmetry among similar mobile services. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993). The

¹ The FCC's Bidder Information Package for the most recent PCS auction warned bidders that "winning a broadband PCS license in this auction is not a guarantee of success in the marketplace."

Commission concluded in its CMRS Third Report and Order that SMR services and CMRS services such as cellular and PCS are similar mobile services and are thus competitors. See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988 (1994). SMR providers were thus reclassified as CMRS providers (common carriers). Since the 1993 Budget Act, SMR providers like Creative have been subjected to numerous regulatory obligations² imposed on newly-classified CMRS providers under the general theory that SMR services are “substantially similar” to PCS and other common carrier services. Thus, the Commission cannot have it both ways, if Creative receives the burdens of regulatory symmetry, it should also receive the benefits.

On March 31, 1997, the Commission released an Order, suspending its collection of broadband PCS installment payments. Order, DA 97-649, released March 31, 1997. In its Order, the Commission set forth two reasons for suspending the installment payment obligations for PCS licensees paying by installment: (1) the FCC was considering a change in its collection procedures; and (2) the FCC was considering changing the timing of the payments from quarterly to annual. Why weren't 900 MHz SMR licensees included in the relief granted by the Order? Certainly issues such as timing of the payments and which federal agency receives the payments are issues that do not distinguish between PCS and SMR licensees.

² Examples of these new requirements are EEO reporting, number portability, resale obligations, etc.

The Commission's Order also references a March 13, 1997, letter from several PCS licensees requesting that the Commission move from a quarterly to annual installment payment plan. See Letter from Thomas Gutierrez et al., to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, dated March 13, 1997 ("PCS Letter"). However, nothing contained in the PCS Letter states that PCS licensees face challenges that are materially different from other CMRS providers who pay for their licenses by installment. For example, the PCS Letter states that a change from quarterly to annual payments will "mitigate the time-to-market infrastructure deployment advantage that cellular incumbents and A & B block licensees have enjoyed. . . ." This statement is equally true for MTA-based 900 MHz SMR licensees. The PCS Letter also notes that licensees have faced a "cautious domestic investment climate."³ This is especially true for a small business like Creative, whose "domestic investment climate" could also be accurately described as "cautious." Finally, the PCS Letter states that a change in the installment plan would permit PCS carriers to "immediately concentrate their capital resources toward infrastructure buildout." Again, smaller SMR licensees must also buildout their systems, generally covering a greater geographic area (MTAs). Thus, based on the plain facts and arguments before the Commission at the time of the Order, it should not have suspended installment payment plans for only one class of CMRS licensee paying by installment.

Creative recognizes that the Commission must maintain some regulatory differences between different radio services. In this regard, some PCS licensees may claim that the

³ The PCS Letter stops just short of stating the obvious -- the licensees might not be able to fulfill their payment obligations.

position of 900 MHz SMR licensees is materially different from C-block licensees because of the sheer size of installment payments that C-block licensees are required to pay. This is essentially an argument that PCS licensees are in greater need of financial relief. Creative concedes that C-block licensees owe the U.S. Treasury a substantial amount of money. However, this simple monetary distinction is not compelling for several reasons. First, the Commission's policies requiring timely payment of winning bids are revenue neutral. Moreover, SMR licensees, while paying smaller amounts, are also much smaller entities, so that the payment amount is relative. For the 900 MHz SMR service, a "very small business" has less than \$3 million in average gross revenues over a three-year period. 47 C.F.R. § 90.814 (1996). Finally, the amount of a licensee's installment payment is derived from its winning bid amount. Each auction participant certified that it was financially qualified to hold a license and was free to exit the auction if the bid prices were too high. Thus, in considering its obligation to accord regulatory symmetry to wide-area 900 MHz SMR licensees, the Commission should not view the differing payment amounts or financial need as a key factor.⁴ Rather, the Commission should consider that SMR and PCS providers are competitors in the mobile communications marketplace. Differences in regulatory treatment must be based on tangible differences and regulatory symmetry should be implemented where practical.

Creative does not comment on the individual merits of each proposal referenced in the Commission's Public Notice. All are likely effective in easing the self-imposed financial burdens faced by PCS licensees. The only relief that Creative demands is equal treatment for

⁴ The Commission has apparently already determined that a PCS licensee's financial health is not a factor because it suspended payments for all C-block licensees, whether or not a demonstration of financial need was offered.

900 MHz SMR licensees. The Commission is apparently offering relief to PCS licensees based solely on the widely-rumored dire financial condition of several PCS licensees. That decision, if it excludes 900 MHz SMR licensees who have complied with the auction rules and honored their payment obligations, turns the legislatively-mandated concept of "regulatory symmetry" on its head. Both PCS and SMR were licensed by similar competitive bidding schemes, in similar geographic-sized markets, to serve similar customer bases, and with similar licensing rules. Therefore, there should be no service-specific difference so great as to permit the FCC to completely change its installment payment plan policies for one service and not even consider similar changes for the other service.

Several PCS licensees have also offered relief plans that include relaxation of the Commission's attribution rules. These licensees claim that increased investment in C-block licensees will mitigate the damage caused by the weak investment climate. Again, if changes are made to the Commission's attribution rules, the same changes should be made for 900 MHz SMR licensees. For example, in order to fall within the definition of a very small business, Creative's owner was required to make significant changes in his business holdings -- changes which have subsequently made it more difficult to raise revenue. Thus, if there is good cause to change the attribution rules for PCS licensees, those same (or similar) changes should also be made for 900 MHz SMR licensees.

III. The Commission Should Apply An Equal Interest Rate

In a separate Public Notice, DA 97-1152, the Commission seeks comment on whether it should apply a 6.5 percent interest rate for PCS licensees granted licenses on or before September 17, 1996. Again, for all of the reasons set forth above, 900 MHz SMR licensees

should be fully included in these considerations. Creative was granted its 900 MHz SMR authorizations on August 16, 1996, and currently pays a 7 percent interest rate, a rate based on similar calculations which are used for PCS licensees. See 47 C.F.R. § 24.711(b)(2) (1996). If the Commission reduces the interest rate applicable to debt incurred by PCS licensees it should make a similar reduction for 900 MHz SMR licensees. The C-Block and 900 MHz SMR auctions concluded in the same quarter of 1996 and the interest rates should be the same. The reasons for the timing of an auction (and subsequent licensing action) are affected by numerous factors that are completely beyond the control of the bidder. For example, if Creative was required to respond to a petition to deny, or had filed a waiver request with its application, its license may have been awarded later and it would have a lower interest rate. Thus, based on the foregoing, the Commission should reconsider its interest rate policies with respect to 900 MHz SMR licensees as well.

IV. Conclusion

WHEREFORE, THE FOREGOING PREMISES CONSIDERED, Creative submits these comments and urges the Commission to uphold the principle of regulatory symmetry by affording 900 MHz SMR licensees the same regulatory benefits it intends to bestow on its PCS competitors.

Respectfully submitted,

CREATIVE AIRTIME SERVICES, LLC

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